MISCELLANY.

Physical Examination in Personal Injury Cases.—The Michigan Law Review finds in the decision of the Illinois Supreme Court in Wheeler *v.* Chicago, etc., R. Co., 108 N. E. 330, occasion for an examination of the divergent views of different jurisdictions as to the right of the defense in an action for personal injuries to an examination of the body of the plaintiff. It appears that in Minnesota, Michigan, Missouri, Georgia, Alabama, Wisconsin and Washington the defendant is accorded this right without qualification, while it is denied generally in Massachusetts, Illinois, New York and Texas, although in New York and Texas the right is accorded where the plaintiff has exhibited his injuries to the jury. The Supreme Court of the United States is of the latter opinion, while the Supreme Court of Tennessee has recently taken the position that it is not necessary that the right to such examination be given by statute, to enable a court to compel the plaintiff to submit to the examination.

Both the logic and justice of the case would seem to lie on the side of an absolute right to such examination. A party to a suit may be compelled to bring into court any evidence within his possession, no matter how harmful it may be to his contentions. Nothing in the way of evidence is so peculiarly in the possession of the plaintiff in such an action as the condition of his body after the alleged injury. Under the law as it exists, his own physicians may testify to the result of their examinations, though this is obviously in the nature of secondary evidence, while the defendant is denied the right to test the truth and soundness of their testimony by having the plaintiff's person examined by its own physicians. In principle there is no difference between this and permitting a party to prove the contents of a document still in existence and accessible by a sworn copy, while denying access to the original to the adversary party.

We are unable to see any stronger case for such an examination where the plaintiff submits to the view of the jury the injured member. Whatever is thus disclosed is disclosed to the advantage or detriment of either party. Doubtless in such a case expert testimony would be admissible on the question as to whether the present condition of the plaintiff was caused by the alleged injury; but it is difficult to see how such an exhibition, without medical testimony as to the nature and extent of the plaintiff's injuries which are not visible, could call for a compulsory examination by the defendant's physicians with a view to their testimony being offered by way of rebuttal of the evidence furnished by the mere exhibition of the plaintiff's person to the jury. The real justification of a compulsory examination in such case is found in the broad general principle that

a party may not withhold material evidence which is within his possession.

That such an examination is the absolute right of the defendant, if justice is to be done, could be shown by many illustrations. The writer once tried a personal injury case in which the plaintiff had lost half of his foot. The effect of exhibiting the injured member was plainly apparent. There was in that case no question but that the injury was caused by the plaintiff's foot being crushed between the cogwheel of the machinery with which he was working; but a case is easily conceivable in which the same appearance might be due to a congenital deformity which a cursory examination, such as could be given while the witness was on the witness stand, might not detect. So an apparent shortening of a limb may be congenital instead of being due to an accident, a fact which an examination would almost infallibly reveal. What natural right has a plaintiff to come into court with a false account of his injuries, while withholding from the defendant the opportunity of testing the truth of his statements by the physical evidence of his body? And, of course, the case is even stronger where medical witnesses for the plaintiff are allowed to testify as to the result of their examinations. To babble of the sacredness of one's person, as an excuse for the perpetration of obvious and gross discrimination between the parties, seems to us almost puerile. We quite agree with the *New York Law Journal* when it comments on that category of decisions, as follows:

"Upon the specific question involved in the principal case it would seem that the decision of the Supreme Court of Illinois manifests very obstinate conservatism. The gist of the argument against a court's inherent power is, as our contemporary shows, 'the inviolability and sacredness of one's person, and his right to possess or control the same "free from all restraint or interference of others."' It would seem the part of common sense and justice to hold that where 'the plaintiff voluntarily exhibits his person to the jury * * * he thereby waives his privilege to object to a physical examination, and evidence thus put into the case should, like all other exhibits in evidence, be open to attack and examination by the opponent.'"

On the narrower question of the right of the defendant to an examination after the plaintiff has exhibited his injuries to the jury, the New York Supreme Court, at General Term, in the case of Winner *v.* Lathrop, 22 N. Y. Supp. 516, said:

"I have been referred to no case, nor have I been able to find any, in which a party claiming a physical injury has first voluntarily submitted the injured part to the inspection of the jury as evidence and has refused to permit the adverse party to follow up that examination in the presence of the jury by a personal or professional inspection of such injured part. Such an examination seems to me to stand

upon a different principle from that of a compulsory examination by the adverse party, before or at the trial, when the injured party has not made a profert of the injured part. It seems to me that it would be unfair, and might result in gross injustice to the party against whom such evidence was used. In such a case it would be in the power of the party by muscular distortion of the injured part, especially an arm or hand, to impose upon the jury and court as well as the adverse party, and produce upon the mind of the jury a false impression as to the extent of the injury. The member having been put in evidence as part of the direct examination, it is for the purpose of the trial made the property of the court and opposite party for the purpose of a cross-examination. It is difficult to conceive of a species of evidence that is offered by one party in support of his case which may not in the presence of the same tribunal be examined and criticised by the party against whom it is offered. We think, therefore, that the inspection and examination of this limb should have been ordered and permitted by the court, and in case of refusal to submit to such inspection by the plaintiff her evidence so far as that exhibit and explanation of the same by the plaintiff was concerned should have been stricken out on defendant's motion."

It is not at all likely that the courts, which hold to the sacredness-of-the-person theory, will alter their holdings, and the case seems therefore to require legislative cure, which should not stop short of the statute of New York, adopted after the decision in the instant case, which grants to the defendant, the unqualified right to examine the person of the plaintiff in advance of the trial.—National Corporation Reporter.